Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-970

CLYDE ROWLETT and
DICK VERMILLION - - - - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
AND
APPENDIX

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IN THE

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No. _____

CLYDE ROWLETT and
DICK VERMILLION - - - - *Petitioners*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, CLYDE ROWLETT and DICK VERMILLION, respectfully pray that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on October 11, 1978.

OPINIONS BELOW

The Opinion of the Court of Appeals entered on October 11, 1978 (Appendix A) is reported at —— F. 2d ——. A Petition for Rehearing *en Banc* was filed. The Order of the Court of Appeals denying the Petition for Rehearing was entered on November 20, 1978 (Appendix B).

JURISDICTION

The Opinion of the Court of Appeals for the Sixth Circuit (Appendix A) was entered on October 11, 1978; and a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Sixth Circuit (Appendix B) on November 20, 1978. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor's failure to provide defense counsel with clearly exculpatory evidence, pursuant to a specific and relevant pretrial request, is inexcusable and deprived petitioners of a fair trial.

2. Whether admission of "crucial" and "devastating" evidence pursuant to the co-conspirators exception to the hearsay rule violated the confrontation clause of the Sixth Amendment.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

> §1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> . . .
>
> §2. Principals
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioners Dick Vermillion and Clyde Rowlett, sheriff and a deputy sheriff of Whitley County, Kentucky, were convicted by a jury in the Eastern District of Kentucky of counts 1, 2, 3, 7 and 9 of a fifteen count

indictment charging them with the substantive offense of obstructing commerce by extortion, 18 U.S.C. §1951, and with conspiracy to commit that offense. The indictment charged petitioners and an acquitted co-defendant with wrongfully extorting various sums of money from bootleggers in Whitley County by the wrongful use of fear and under the color of official right.

The prosecution obtained the convictions in this case primarily upon the basis of tape recorded conversations between each petitioner individually and a bootlegger-police informant named Kirby Collett. In some of these tape recorded conversations, one petitioner made statements incriminating the other. In other conversations, the other petitioner made statements incriminating the first. Neither petitioner testified at trial. The cross-incriminating statements were admitted into evidence pursuant to the co-conspirators' exception to the hearsay rule. The incriminating statements of either non-testifying co-defendant on these tapes, as well as comments by the witness and comments by the prosecutor about such statements, were never confronted where neither petitioner took the stand.

Prior to trial, the defense made specific and relevant requests for disclosure of the tape recordings of petitioners' conversations. The trial court also specifically ordered such disclosure. Many relevant taped conversations were, in fact, disclosed prior to trial.

On September 6, 1977, the prosecutor gave assurances that all tape recordings of petitioners' conversations had been disclosed:

> Court: Is that all of them?
>
> Prosecutor: Yes, Your Honor, that's all of them.
>
> Defense Counsel: Is this all of the recordings —the Kentucky State Police tapes?
>
> Prosecutor: And the Federal Bureau of Investigation.
>
> Defense Counsel: This is everything here?
>
> Prosecutor: That is everything. [Pre-Trial Motion Hearing, September 6, 1977, pp. 33-34.]

Subsequently, it developed that several other tape recordings of petitioners' conversations *had not* been disclosed. The existence of one recording in particular was not revealed until well into the prosecution's case, during the testimony of a Kentucky State Police witness. This one recording in particular was of a conversation between Sheriff Vermillion and the bootlegger-informant Kirby Collett; this particular recording was exculpatory.

The uncontested substance of this previously undisclosed taped conversation is described as follows:

> Well, it's Kirby Collett getting on the phone and calls up and Dick Vermillion answers the phone, and Mr. Collett says something to Mr. Vermillion about the place of his being raided that day or the day before, and he wanted to know more certain where it came from, and Mr. Vermillion says it came from Judge Skinner, who is a magistrate, and he wanted to know who got it, and Mr. Vermillion said "I did," and Collett said "Well, what's wrong?" And Dick said something to the effect "What do you mean what's wrong?" And he said "Well, weren't you supposed to be getting

> paid" or something like that, and there's a few little cuss words in there, and—you know what in the hell I'm talking about—I don't know what in the hell you're talking about—I'm not going to let you set up there and bootleg—I'll come up there and raid you tonight, and he said—Come on, I'll be waitin' on you. [Trial Transcript, pp. 825-826.]

Petitioners were charged with conspiring to extort and extortion of money from the bootlegger-informant Collett in exchange for not enforcing liquor laws against him. The particular tape in question was absolutely exculpatory because it *demonstrates the absence of the very extortion and conspiracy alleged.* In spite of specific and relevant requests by the defense, and specific orders of the court to disclose, the prosecution utterly failed to produce this exculpatory conversation prior to trial.

The Sixth Circuit Court of Appeals affirmed petitioners' convictions.

REASONS FOR GRANTING THE WRIT

First Question: Inexcusable Failure to Disclose Exculpatory Evidence Pursuant to Specific and Relevant Pretrial Request:

1. The actual, practical effect of the decision of the Sixth Circuit is that it provides prosecutors with license to withhold clearly exculpatory evidence, even when specifically requested, until well into the presentation of their case at trial. Under the disputed decision, prosecutorial compliance with meaningful pretrial disclosure is nullified.

In the present proceeding, it is not disputed that the prosecution received specific and relevant requests for material evidence. The trial court also specifically ordered the prosecution to disclose the tape recordings of petitioners' conversations. The prosecution assured court and counsel that *all* such recordings had been disclosed.

> "All the tapes that we intend to introduce during the trial of the case we have furnished, Your Honor." [Pre-Trial Motion Hearing, September 6, 1977, p. 31.]
>
> * * *
>
> "That is everything." [Pre-Trial Motion Hearing, September 6, 1977, p. 34.]

The petitioners relied on these assurances by the prosecution.

Nevertheless, during the presentation of the prosecution's evidence, the existence of other tape recordings was revealed. One tape recording was clearly exculpatory. As the disputed decision acknowledges, the previously undisclosed evidence was exculpatory.

> [T]he court is of the opinion that the evidence in question was in fact exculpatory. . . . [Opinion, p. 3; Appendix, p. 14.]

Indeed, the undisclosed evidence was a police tape recording of the petitioner Vermillion telling the bootlegger-police informant (the prosecution's chief wit-

ness) that the petitioner was not about to let the bootlegger break the law.

> . . . I'm not going to let you set up there and bootleg—I'll come up there and raid you tonight. . . . [Trial Transcript, p. 826.]

In this extortion case alleging that petitioners received pay-offs for not enforcing liquor laws, there could be no greater exculpatory evidence.

2. The Sixth Circuit's decision excused the prosecutor's failure to disclose this clearly exculpatory evidence prior to trial, even where such evidence had been specifically requested. In so holding, the disputed decision did not follow this Court's standard announced in *United States* v. *Agurs*, 427 U. S. 97 (1976).

> When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *Id.*, at 106.

The disputed decision did not apply this strict *Agurs* standard in this case of nondisclosure pursuant to a specific and relevant request. Under the strict *Agurs* standard, no showing of prejudice is necessary where the prosecution withholds exculpatory evidence in the face of "a specific and relevant request." The language of *Agurs* imposes an absolute duty on the prosecution which, if breached, *is seldom, if ever, excusable.*

3. Instead of applying the standard announced in *Agurs*, the Sixth Circuit's decision applied a standard requiring a showing of prejudice reserved in the *Agurs* decision to cases in which "no" request or a "general"

request for exculpatory evidence has been made. The disputed decision stated:

> [T]he court is of the opinion that upon the record here the failure to make a more timely disclosure as required by the district court's orders was not prejudicial to the defense. [Opinion, p. 3; Appendix, p. 15.]

Nevertheless, there is always prejudice to the defense from a failure to disclose exculpatory evidence prior to trial. Often this prejudice is too broad to pinpoint precisely. In many cases, the harm leads to a guilty plea which can never be reviewed. In many cases, the harm leads counsel to remain ignorant of a basic avenue of defense. In still other cases, as in the present case, the harm causes counsel to enter the trial with significantly less weapons in his defense arsenal than by rights he should possess. When trials become a poker game in which a contestant cannot even see his own cards, then due process has been denied. Cf., *Wardius* v. *Oregon*, 412 U. S. 470, 475 (1973).

4. The consequences of allowing the disputed decision to govern other similar situations are devastating. The record in this proceeding is replete with the petitioners' repeated and vehement attempts to obtain meaningful pretrial disclosure of tape recordings of their cross-incriminating conversations in the hands of the prosecution. The prosecution repeatedly assured the defense that all such tapes had been disclosed, only to release one clearly exculpatory tape well into the actual trial. Now, the disputed decision stands as a tower of approval that prosecutors can ignore: specific

and relevant defense requests for pre-trial disclosure; a trial court's specific orders for pretrial disclosure; discovery rules; fundamental concepts of fairness and due process; and this Court's pertinent admonition in *Agurs* that such a failure to disclose is "seldom, if ever excusable."

5. This Court is in a proper position to assure that one fundamental part of a fair trial must be meaningful prosecutorial responsiveness to specific pretrial requests for disclosure of exculpatory evidence.

Second Question: Admission of "Crucial" and "Devastating" Hearsay Evidence Violated Confrontation Values:

1. The actual, practical effect of the Sixth Circuit's decision is to allow criminal defendants to be convicted on the basis of unconfronted evidence which is crucial to the prosecution's case. In this proceeding, neither petitioner testified. Nevertheless, each petitioner's statements incriminating the other were introduced at trial in the form of many tape recorded conversations and comments by the prosecutor and the prosecution's witness-informant about those conversations. Neither petitioner was ever able to confront the statements of his co-defendant at trial. The many taped conversations and comments thereon which cross-incriminated the non-testifying petitioners were the crucial backbone of the prosecution's case. These many taped conversations and comments thereon were obviously devastating to the petitioner's defense.

2. In *Dutton* v. *Evans,* 400 U. S. 71 (1970), this Court reviewed the many occasions on which it had

found a violation of confrontation values even where evidence had been admitted pursuant to a recognized hearsay exception.

> [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. *Id.,* at 82.

Accord, California v. *Green,* 399 U. S. 149, 155-156 (1970).

3. In *Dutton* v. *Evans, supra,* this Court left unanswered the question of whether confrontation values are indeed violated by the admission of *"crucial" or "devastating" evidence* pursuant to the co-conspirators' exception to the hearsay rule. In affirming, this Court explicitly stated in *Dutton:*

> This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. *Dutton* v. *Evans, supra,* 400 U. S. at 87.

The question explicitly left unanswered by this Court in *Dutton* v. *Evans, supra,* has been echoed by the Ninth Circuit in a later case. The question is there stated:

> [I]f evidence is crucial or devastating, it could be absolutely barred from admission on confrontation clause grounds. *United States* v. *King,* 552 F. 2d 833, 846, n. 16 (9th Cir. 1976), cert. den.

4. In the present case the record reveals such massive amounts of unconfronted hearsay evidence admitted pursuant to the co-conspirators' exception that

it cannot be denied that all this massive hearsay evidence is "crucial" to the prosecution's case as proof of conspiracy and extortion, and "devastating" to the petitioners' case.

5. Because the evidence admitted pursuant to the co-conspirators' exception to the hearsay rule was "crucial" and "devastating," confrontation values have been violated. The question explicitly left unanswered by *Dutton* v. *Evans, supra,* and not seriously taken up since by this Court is ripe for consideration on the present case.

6. It is of great importance that this Court accept the awesome responsibility to resolve the question left unanswered in *Dutton* v. *Evans, supra:* the supremacy of the confrontation clause to the co-conspirators' exception to the hearsay rule. The present case provides an appropriate opportunity for resolution. The impact of such a difficult but necessary decision would clarify one of the most pervasive questions within our criminal procedure.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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December 14, 1978

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

78-5121/78-5122

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee*

v.

CLYDE ROWLETT, et al. (78-5121) and
DICK VERMILLION (78-5122), - *Defendants-Appellants*

OPINION AND ORDER—Filed October 11, 1978

Before: EDWARDS, LIVELY and ENGEL, Circuit Judges.

Appellants Dick Vermillion and Clyde Rowlett were the sheriff and a deputy sheriff of Whitley County, Kentucky, who have been convicted of counts 1, 2, 3, 7 and 9 of a 15-count indictment charging them with the substantive offense of obstructing commerce by extortion, 18 U.S.C. §1951, and with conspiracy to commit that offense. The indictment charged them and a co-defendant, Marvin Hammons, with wrongfully extorting various sums of money from bootleggers in Whitley County by the wrongful use of fear and under the color of official right.

In their direct appeal, defendants assert the following grounds for reversal of their convictions and sentences:

1. That they were denied the Sixth Amendment rights to a speedy trial by the 19-month delay between their arraignment on the charges and their trial;

2. That they were denied due process under the Fifth Amendment when the prosecution withheld evidence claimed to be favorable to them;

3. That they were denied due process of law because:

(a) the conspiracy counts failed to allege an overt act;

(b) a single conspiracy was charged but two conspiracies were proved, and

(c) count 7 of the indictment was duplicitous.

4. That each defendant was denied due process and the right of confrontation guaranteed him under the Sixth Amendment by the introduction into evidence of the other's unconfronted statements, neither defendant having testified at trial;

5. That the evidence was insufficient to support their convictions;

6. That their counsel did not render them effective assistance at trial;

7. That the sentences imposed were excessive and amounted to cruel and unusual punishment.

Upon a careful review of the record of the trial and a consideration of the briefs and arguments of counsel, the court is of the opinion that the first six allegations of error enumerated above are without merit, and we decline to address the seventh in this appeal for the reasons stated below.

Of the several claims of error, the most potentially serious is that the prosecution was guilty of withholding from the defense evidence favorable to it in the form of a tape-recorded conversation which took place between the defendant Vermillion and one Kirby Collett, a bootlegger turned government informant.

While the court is of the opinion that the evidence in question was in fact exculpatory, and while it was at best neglectful of the prosecution to have failed to discover and

deliver over such evidence in advance of trial, full disclosure was made to the defense during the course of the trial and before the government rested its proof. Under such circumtances, the court is of the opinion that upon the record here the failure to make a more timely disclosure as required by the district court's orders was not prejudicial to the defense. As in *United States* v. *Enright,* (No. 77-5239) (6th Cir., decided June 20, 1978), the failure was discovered in time for full and adequate correction, especially where the court did not preclude the defense, had it so desired, from making an opening statement after the government rested and prior to any presentation of its own proofs.

It appears that the tentative sentences which the defendants claim to be cruel and unusual punishment are not final and were imposed in accordance with 18 U.S.C. §4205(c) and (d), providing for a delay in final sentencing pending further evidence concerning the condition of appellants. The propriety of the sentences is not reached in this appeal and adequate opportunity remains to seek review of any final sentences when they are rendered. Accordingly,

It Is Ordered that the judgment of the district court in each of the above-captioned appeals be and it is hereby affirmed.

Entered by Order of the Court
(s) John P. Hehman
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

78-5121 and 5122

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee*

v.

CLYDE ROWLETT and
DICK VERMILLION, - - - *Defendants-Appellants*

ORDER—Filed November 20, 1978

Before: EDWARDS, LIVELY and ENGEL, Circuit Judges.

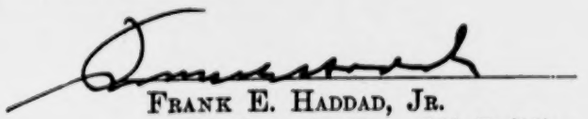
No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

The petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 1978, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to Hon. Wade McCree, Solicitor General, Department of Justice, Washington, D. C. 20530, and Hon. Patrick Molloy, United States Attorney, Eastern District of Kentucky, Post Office Building, Lexington, Kentucky 40501. I further certify that all parties required to be served have been served.



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